

In the matter of)
) GN Docket No. 09-51
A National Broadband Plan)

To the Commission:

Clearly the Commission's proposed National Broadband Plan (“Plan” hereinafter) is the first step in a process toward transitioning all spectrum users in the United States of America to a blend between the property-rights approach in licensing spectrum and the commons approach, in toto known as 'market based' spectrum use (“market based spectrum use” hereinafter). Of course, this assumes these are the only two options available or recognizable at law. From the approaches suggested by the Commission in the Plan, Title I (47 USC) licensees would form part of the commons, whereas Title II licensees would form part of the property-rights approach. There might exist a smattering of 'legacy' licensing, but that would be a rare exception rather than the rule, and this would eventually lead to licensing by rule – again, a 'commons' approach.

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could cost the Commission and taxpayers – as well as Title II users – a pretty penny in litigation for many years to come. To avoid this, the Commission envisions sharing spectrum auction proceeds with incumbent licensees – of course, without suggesting how much or in what proportions those proceeds should be shared. That murky suggestion is little more than a taunt to those who already possess what I suggest is a property right in their spectrum.

Because it accurately summarizes several of the scenarios the Commission itself may use or is using to transition the United States of America to a market based spectrum use system, I'll refer to the report known as the "Digital Age Communications Act (DACA)" published in 2006 and again in June 2009 by the Progress and Freedom Foundation's working group on spectrum policy (many of whom have filed comments in this proceeding) – known hereinafter as the "DACA Report." The DACA Report outlines the various options the Commission, with Congressional and Presidential approvals, may take with respect to dealing with incumbent users of spectrum. One of these approaches is broadly elucidated by the Plan itself. Broadcasters and other incumbents would be well-advised to read the DACA Report and familiarize themselves with its content; however in error that DACA Report might be. Regardless of one's opinions about the legitimacy of the DACA Report's conclusions, it cautions that any of its approaches could lead to litigation, and in this sense, I completely agree and, in fact were the Plan to be approved in its present form, I might favor availing myself of the Courts' many remedies against the Commission for reasons stated hereinafter.

First, I disagree with the DACA Report's premise that our current licensing system (what it calls a command and control regulatory system) doesn't already embody property rights. Real estate law treats licenses to real estate as easements when those licenses are the result of a payment of a fee, and for many years now, Congress has required the payment of a fee to get a license (application filing fees,

regulatory fees, etc.). Accordingly, assuming the DACA Report's own 'real estate' approach to the spectrum, licensees already possess rights to their spectrum. One could even argue that secondary users (Part 15, Part 95, and similar 'permitted' users) have an easement in spectrum held or capable of being held by a licensee. Second, real estate law recognizes that long-standing use (adverse possession) is an avenue for acquiring title to realty. Third, in precedent for the United States of America, the Homestead Acts promised valuable real estate rights in exchange for constructing structures and farming land, and I suspect no less is true in terms of the Communications Act of 1934, as amended.

Finally, there is the doctrine of equitable estoppel, which is even valid as against the government. Equitable estoppel essentially posits that one cannot gainsay (speak against) what they have previously agreed to or acquiesced to allow. In this sense, and using broadcast licenses as an example, the Commission for many years has approached the transfer and assignment of broadcast licenses as they would the transfer of a deed, leading to the current values in broadcast licenses. By reason of equitable estoppel, broadcast spectrum users are already entitled to assert a property right as against the United States of America inasmuch as the value of their spectrum. I understand that all license applications suggest that applicants waive any right as against the regulatory power of the United States of America by way of the FCC, that's no different than respecting the right of my local municipality to require me to obtain a permit before adding onto my home: it still does not gainsay my legal title to my home anymore than the bare statement in each license application can gainsay my legal title to the spectrum currently held following authorization. While my legal training is not as comprehensive as a property rights trial advocate specialist's knowledge would be, it is clear that if this layman can find these many ways in which current (incumbent) licensees already own a property right in their licenses, the Courts will no doubt find many others.

It has been, and continues to be, the Constitutional duty – through their oath of office - of all officeholders in the United States of America to respect the existing property rights of citizens of the United States of America. While the Commission may disagree, I assert that existing and incumbent licensees already possess and own property rights in their spectrum, and that ownership is akin to real estate property rights as stated in the immediately preceding paragraph. Those Title II licensees behind this Plan and the Commission would be well advised to consider the potential litigation costs, given that incumbents could stand to lose nothing (and gain up to everything) by suing the Commission and any Title II licensee acquiring a license in an incumbent's spectrum. Accordingly, in going forward with its Plan, the Commission would be well advised that there are many licensees, including the undersigned who, despite the Commission's word to the contrary, are perfectly willing to resort to the Courts for justice should the Commission disregard our standing rights to the contrary. Given the current Independence Day season is upon us, and all the history surrounding it, rather than stealing spectrum from incumbents, the Commission would do well to consider, in the alternative, the possibility of allowing incumbents to own their spectrum (Option 5 of the DACA Report) and lease that spectrum to Title II prospective users.

Respectfully,

A handwritten signature in black ink, appearing to read "James Whedbee", written over a faint, stylized graphic that resembles a triangle or a stylized letter 'A'.

James Edwin Whedbee, M.Ed.

A simple handwritten checkmark or 'V' shape in black ink.

July 1, 2010

5816 NE Buttonwood Tree Lane
Gladstone, MO 64119-2236
June 29, 2010 @ 2230 CDT
Owner: KZJW-LD

References

FCC (2010). National Broadband Plan. Washington, D.C.

The Progress & Freedom Foundation (2006, 2009). Digital Age Communications Act (DACA) Report from the Working Group on New Spectrum Policy. Washington, D.C. (Membership on said working group consisting of those members listed below.)

APPENDIX: Membership of the DACA Working Group – Quoted from the Report above...

“...The Digital Age Communications Act Project Advisory Committee Members

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* The Advisory Committee was established to provide a broad and diverse source of experience and expertise to the project. The Committee's members do not necessarily endorse the proposals contained in this paper or in any papers issued subsequently by the working groups, and the positions of the Working Groups should not be attributed to them by virtue of their Advisory Committee membership.

***Page 25 A Digital Age Communications Act* The Digital Age Communications Act Project Working Groups Regulatory Framework**

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